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## Bathroom Bias: Making the Case for Trans Rights under Disability Law

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# BATHROOM BIAS: MAKING THE CASE FOR TRANS RIGHTS UNDER DISABILITY LAW

Daniella A. Schmidt\*

*Disability law is one of the more successful tools currently being used to protect trans people from discrimination. While the use of disability law as a framework for affirming or creating trans rights has come with some success, many in the community remain reluctant to use disability law for fear of the policy implications and stigma associated with medicalization of trans identity. After exploring the current state of the law on both the federal and state level, this Note will argue how disability law both could and should be used more often to further trans protections. In particular, this Note will look at the role of bathroom access in the fight for trans civil liberties and how disability law might be used to affirm trans people's access in the workplace to gendered bathrooms that accord with their lived sex.*

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\* J.D. Candidate, University of Michigan Law School, May 2013. I would like to thank Ellen Katz, Samuel Bagenstos, and Noah Hall for their helpful comments. I would also like to thank Emily Miller for her invaluable feedback and tireless editing. Finally, I would like to thank Adam Read-Brown for his endless support and infinite wisdom.

Reading about identity politics leads to questions about the author's subject position. I am a cis woman. This Note is therefore written entirely from the perspective of someone who has at no point identified as trans.

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## INTRODUCTION

*Ben is a trans man.<sup>1</sup> He began socially transitioning six months ago. Ben began his transition while working for a large company in the United States. He had been working for the company for several*

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1. There are a number of terms that are widely used to refer to a “trans” person. It should be acknowledged that these words are often understood to mean different things by different people, and that there is strong disagreement about how, or whether, some of these words should be used. The following are working definitions for the various terms that appear throughout this Note. I will generally use the term “trans” to refer to people who identify as transgender or transsexual. These definitions are a slightly altered version of those used by The University of Michigan Law School Outlaws for various presentations. *See, e.g., Trans 101 Workshop*, OUTLAWS, (Mar. 4, 2010, 7:11 PM), <http://blog.umoutlaws.org/2010/03/trans-101-workshop.html>.

*Transgender*: A broad umbrella term that applies to people who embody an innate sense of gender identity other than their sex assigned at birth.

*Transsexual*: Persons who seek to live in a gender different from the one assigned at birth and who may seek or want medical intervention (through hormones and/or surgery) for them to live comfortably in that gender.

*Cisgender*: Persons whose gender identity and gender assignment at birth match.

*Trans man*: A person who was assigned female at birth but identifies as male. Trans men are sometimes referred to as “female-to-male” or FTM.

*years before deciding to transition. The County Clerk's office has already granted Ben his name change. Though Ben is taking hormones, he cannot afford surgery to treat his gender dysphoria<sup>2</sup>, but hopes to be able to in the future. Ben is waiting to change the sex marker on his legal documents until after he has completed surgery.<sup>3</sup> Recently, Ben decided to inform his company of his transition and his preferred name. In addition, Ben has requested access to the men's restroom. The company has summarily rejected Ben's request*

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*Trans woman:* A person who was assigned male at birth but identifies as female. Trans women are sometimes referred to as "male-to-female" or MTF.

*Sex:* Refers to the designation of the variety of biological differences between females and males. Not everyone fits into two categories.

*Gender identity:* Self-conception of one's gender, which may or may not be congruent with physiology or with gendered stereotypes about men and women. This describes how people perceive their own internal sense of maleness, femaleness, or other gender identity.

*Gender expression:* Physical manifestation of one's gender identity, often expressed through clothing, accessories, mannerisms, and chosen names.

*Transition:* The process of living and being perceived as a gender other than that assigned at birth. The process of transitioning varies among trans individuals. It may include counseling with a professional therapist, undergoing hormone therapy, having surgery of the face, chest, genitals or other areas, changing one's name or preferred pronouns, or dressing as the preferred gender. Some transgender people do not medically transition at all, because they do not have the financial means, do not feel comfortable, fear for their safety, or do not feel that it is necessary.

*Lived sex:* Refers to the sex that a trans person has transitioned to, conforming with his or her gender identity.

2. Gender dysphoria, according to the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), describes "strong and persistent feelings of discomfort with one's assigned sex, the desire to possess the body of the other sex, and the desire to be regarded by others as a member of the other sex." Diagnostic and Statistical Manual of Mental Disorders 535 (Am. Psychiatric Ass'n, 4th ed. 2000).

Note also that practitioners and advocates use different language to refer to trans-related surgeries. Some examples include: sex reassignment surgery or gender confirmation surgery. See, e.g., *Victory! Transgender Woman Wins Insurance Coverage for Sex Reassignment Surgery*, TRANSGENDER LEGAL DEF. & EDUC. FUND (Oct. 3, 2012), [http://transgenderlegal.org/headline\\_show.php?id=384](http://transgenderlegal.org/headline_show.php?id=384) (using "sex reassignment surgery" to refer to trans-related surgery); Loren S. Schechter, 'Gender Confirmation Surgery': What's in a Name?, HUFFINGTON POST (April 20, 2012, 11:14 PM), [http://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery\\_b\\_1442262.html](http://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery_b_1442262.html) (discussing why Schechter refers to trans-related surgery as "gender confirmation surgery").

3. It is important to note that in some states, Ben may have to have surgery before changing his sex marker. See, e.g., ALA. CODE §22-9A-19(d) (Westlaw through 2012 Regular and First Special Sessions).

*and has told Ben he is welcome to use the women's restroom or the single-stall handicap restroom located in a different part of the building. Ben is considered an exemplary employee by his colleagues and supervisors alike.*<sup>4</sup>

Does prohibiting Ben, a trans man, from using the men's bathroom at his place of employment constitute legally actionable discrimination under any federal or state law where all other male employees at the company are permitted to use the male bathroom? In particular, does it constitute discrimination under disability law? If so, where? Why? How can a trans advocate make the argument? What are the implications of arguing that it is disability discrimination?

Before trying to answer the above questions, it is important to understand how bathrooms have played a unique role in the fight for civil liberties. Their importance is easy to overlook, yet over the years, controlling bathroom access has been used as a tool to degrade and deny full integration. Integration aside, for trans individuals, such a denial can also be medically harmful. When employers deny trans employees access to gendered bathrooms,<sup>5</sup> the denial has the potential to aggravate existing medical conditions. In addition, it might lead to the development of bladder and kidney infections and negative psychological effects, including heightened gender dysphoric symptoms, which could derail treatment of gender dysphoria and depression. The medical harms and the harms to dignity of bathroom denial to trans people are the result of a rejection of trans identity. Denial of bathroom access perpetuates the "othering" of trans people and leads to the continued violence and harassment of trans people nation-wide.<sup>6</sup> Bath-

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4. Ben's story is a hypothetical used to demonstrate one of the many injustices that plague the lives of trans people in our society. Unfortunately, Ben's story is common for trans people in work places, schools, and public accommodations across the country. For stories of discrimination just like this one, contact the help centers at organizations such as the Transgender Legal Defense and Education Fund, Sylvia Rivera Law Project, Lambda Legal, and the Transgender Law Center.

5. Note that in some cases employers deny access to all bathrooms and not just gendered ones.

6. The violence takes several forms including, but not limited to, physical abuse by police officers and civilians, as well as the psychological abuse of continually requiring trans people to justify their personhood. *See, e.g., Hate Crimes*, NAT'L CTR. FOR TRANSGENDER EQUALITY, [http://transequality.org/Issues/issues\\_hate\\_crimes.html](http://transequality.org/Issues/issues_hate_crimes.html) (last visited Mar. 6, 2013) (detailing legislative responses to hate crimes against trans people); Bob Moser, *Violence Engulfs Transgendered Population in D.C.*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2003/winter/disposable-people> (last visited Mar. 11, 2013) (also appeared in the Winter 2003 edition of *Intelligence Report*); Ali, *After Yet Another Trans Woman's Murder, Change is Coming for Hate Crime Sentencing in DC*, AUTOSTRAD-

rooms, therefore, cannot be underestimated as an integral element in the trans fight for equality.

This Note considers the right of trans people to use the bathroom of their lived sex while at work. Title VII claims and sexual orientation discrimination claims have brought many trans litigants and advocates to a dead end in the fight for trans equality. A new strategy is necessary to advance trans rights; I argue that state disability laws in numerous jurisdictions should be read and interpreted as providing this right. Federal disability laws, including the Federal Rehabilitation Act and the Americans with Disabilities Act, have explicitly excluded trans people from protections against disability discrimination. Trans people are therefore prohibited from bringing claims of disability discrimination under federal anti-discrimination laws. However, as this Note will explore, many state disability laws do not have explicit exceptions written into their disability law protections for trans people. This lack of exclusion leaves room for trans litigants to argue that they should be protected under state disability discrimination provisions.

Disability law<sup>7</sup> offers a relatively new framework to conceive of trans protections and, over the past few years, has proven to have clear benefits in the courtroom.<sup>8</sup> However, using disability law as the framework to advocate for trans rights has come with some strong criticism. Some advocates argue that using the disability law framework stigmatizes trans individuals, perpetuates the medicalization of trans identity, and perpetuates stereotypes about trans people as inherently “flawed”. In this Note, I explain that those

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DLE (Feb 3, 2013) <http://www.autostraddle.com/after-yet-another-trans-womans-murder-change-is-coming-for-hate-crime-sentencing-in-dc-155563/>.

7. Throughout this Note, “disability law” refers to both state and federal disability anti-discrimination laws and jurisprudence.
8. I have often wondered why it is that trans activists do not fight for an entirely new framework of anti-discrimination laws to protect trans people. In Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38 (2000), the authors explain that trans discrimination is rooted in stereotypes, in “how men and women are ‘supposed’ to behave and . . . how male and female bodies are ‘supposed’ to appear.” Such stereotyping is neither new nor unique to the trans community but fits into the already developed frameworks of sex, sexual orientation, gender and disability discrimination. *Id.* As a result, Currah and Minter argue that it might make the most sense to work with the tools we already have. *Id.* at 38–39. Whether or not the legal tools we have will prove effective is something only time will tell.

Regarding the political viability and subsequent legislative granting of bathroom access, this Note will demonstrate that there are instances where state legislatures have passed laws requiring that employers provide access to gender-identity appropriate bathrooms. It is not that the legislative model of social reform is entirely off the table, it is just difficult and requires a more holistic effort that includes community organizing and political participation.

who argue against its use on the aforementioned grounds misconceive the disability law framework and the disability rights movement's goals. I argue that using disability law is not a concession to having a flawed body. The disability rights movement rightly advances the theory that people with disabilities are capable of full participation in society but are unable to participate equally due to normative conditions that privilege certain bodies. The same is true for trans people. I will argue that disability law, where available, should be used in the fight to protect trans people from discrimination, despite the policy concerns.

This Note proceeds in four parts. Part I examines some of the discrimination trans people in the United States face today and the ramifications of those harms specifically as they relate to the work place and bathroom access. Part II presents the current state of disability law vis-à-vis trans inclusion, exclusion, or silence on the matter. Part III argues the case for Ben, demonstrating how one might argue under disability law that denying Ben access to the men's bathroom at work is discrimination. I will briefly outline arguments under the theories of disparate treatment, disparate impact, and reasonable accommodation. Part IV concludes with the policy implications of using disability law to effectuate trans protections. Finally, I reinforce my original conclusion that the utility of the disability framework outweighs the potential repercussions of its use.<sup>9</sup>

## I. THE BATTLE OVER BATHROOM ACCESS

### A. *Why Bathrooms?*

In his poem, *Award*, Ray Durem wrote: "I just don't know how to go to the bathroom in the free world."<sup>10</sup> Durem was referencing the difficulties of a mixed-race man trying to use a bathroom in Texas in the early 1900s. Bathrooms, while not the center of any civil rights agenda, have always been an integral part of the fight for equality. The 1950s saw a fight against the practice of prohibiting black people from using "white" bathrooms.<sup>11</sup> The 1970s saw the Women's Liberation fight against the lack of bathrooms provided by employers in light of the influx of female employees.<sup>12</sup> The 1980s

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9. Disability law might prove to be a preferred framework for some in the gender queer community by virtue of its flexibility and ultimate dismissal of the gender and sex binary upon which sex and gender discrimination protections are predicated.

10. ARNOLD ADOFF, *THE POETRY OF BLACK AMERICA: ANTHOLOGY OF THE 20TH CENTURY*, 153 (1973).

11. Carlos Ball, *Why Bathrooms Are a Civil Rights Issue*, HUFFINGTON POST POLITICS, THE BLOG (Sept. 7, 2010), [http://www.huffingtonpost.com/carlos-a-ball/why-bathrooms-are-a-civil\\_b\\_707376.html](http://www.huffingtonpost.com/carlos-a-ball/why-bathrooms-are-a-civil_b_707376.html).

12. *Id.*

saw the disability rights movement fight for wheelchair-accessible bathrooms.<sup>13</sup>

The notion that civil rights movements face more severe, pressing problems than bathroom access is misguided in multiple ways. Controlling the way people use bathrooms, and whether they are permitted to use them at all, has been used historically as a tool to dehumanize minority groups.<sup>14</sup> Many civil rights activists assert that denying a person access to bathrooms is one of the greatest obstacles to full integration.<sup>15</sup> The minimalist stance on the importance of bathrooms fails to appreciate the role bathrooms play in the lives of all people and speaks to a dominant culture that takes bathroom access for granted. Imagine a world where you either could not use the bathroom, or where every time you tried to use the bathroom, you could expect to be confronted with violence or harassment.

Bathroom segregation in the work place especially highlights the systemic and institutionalized discrimination against trans people. It is settled law that an employer may not assign bathroom usage based on race, that equivalent bathrooms for men and women need to be provided, and that bathrooms must be accessible to persons with disabilities. Despite the protections afforded to other members of the population, employers may still inquire about and pass judgment upon a trans person's genitals. The fight for equal access to bathrooms generally, and workplace bathrooms specifically, fits directly into the narrative of civil liberties in so much as it is a question of equality, dignity, safety, and respect for all people.

### *B. Denied Bathroom Access and its Effects on Trans People*

Denying trans people access to bathrooms that accord with their lived sex can result in serious medical harm and can be physically and psychologically debilitating. Leslie Feinberg, a trans activist and author, writes that trans people "live under the constant threat of horrifying violence. We have to worry about what bathroom to use when our bladders are aching. We are forced to consider whether we'll be dragged out of a bathroom and arrested or face a fistfight while our bladders are still aching."<sup>16</sup> Worse yet is the fear of police violence: "The use of the 'wrong' bathroom . . . often results in

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13. *Id.*

14. *Ask Lambda Legal: Know Your Rights*, LAMBDA LEGAL IMPACT, Summer 2011, at 6, available at [http://data.lambdalegal.org/publications/downloads/impact\\_201106\\_ask-lambda-legal.pdf](http://data.lambdalegal.org/publications/downloads/impact_201106_ask-lambda-legal.pdf).

15. Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010).

16. LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE*, 68 (1998).



arrests for crimes such as public lewdness, public obscenity, [and] public indecency.”<sup>17</sup>

The Sylvia Rivera Law Project (SRLP)<sup>18</sup> in New York City released a documentary in 2003 titled “Toilet Talk” on the persistent discrimination and violence that trans people face in bathrooms, specifically in the work place, in schools, and in other public spaces.<sup>19</sup> “Toilet Talk” discusses the serious physical health problems associated with not being able to use the bathroom: bladder and kidney infections, cystitis, chronic dehydration, and urinary stones. This is coupled with the mental health effects trans people often experience due to denied bathrooms access, such as depression, anxiety, and feelings of inadequacy.<sup>20</sup> As one individual in the documentary notes, “It’s just depressing to be at work . . . to have this pressing biological function, and you’re afraid someone’s going to see you, am I going to have to wait until there’s no one in the hallway . . . the entire situation is anxiety provoking . . . it’s damaging.”<sup>21</sup> In 2002, the San Francisco Human Rights Commission surveyed various trans individuals about, among other things, bathroom usage. One respondent wrote:

I have spent so many hours avoiding public multi-stall bathrooms that I have damaged my bladder and put pressure on my kidneys. The problem was a daily one. I’d think about where I was going, what bathrooms I’d have access to, how much I drank during the day, whether I’d be with people who could help stand guard . . .<sup>22</sup>

Furthermore, the dehydrating effects of limiting liquid intake during the workday in an effort to avoid the bathroom can have separate and serious negative health effects as well.<sup>23</sup> The U.S. Occupational Safety and Hazards Administration (OSHA) declared “delayed voiding” to be detrimental to a

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17. Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN’S RTS. L. REP. 315, 326 (2009).

18. SRLP is an organization dedicated to ending poverty and gender identity discrimination. For more information on SRLP visit: [www.srlp.org](http://www.srlp.org).

19. Tara Mateik and Sylvia Rivera Law Project, *Toilet Training Documentary Trailer*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/resources/toilettraining> (last visited Mar. 1, 2013).

20. *Id.*

21. *Id.*

22. Levi & Redman, *supra* note 15, at 136–37.

23. *Transgender Rights Toolkit: Equal Access to Public Restrooms*, LAMBDA LEGAL, [http://www.lambdalegal.org/sites/default/files/publications/downloads/trt\\_equal-access-to-public-restrooms\\_1.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/trt_equal-access-to-public-restrooms_1.pdf) (last visited Feb. 7, 2013).

person's health.<sup>24</sup> Workplace policies preventing people from using the bathroom encourage this unhealthy behavior.

For all the reasons stated above, the trans community has been forced to adapt, creating websites like [safe2pee.org](http://safe2pee.org) to provide a searchable database for single occupancy and gender-neutral bathrooms in the United States, Canada, and Mexico for trans people too afraid to use multi-stall public bathrooms.<sup>25</sup> Cell phone applications, like "Pee in Peace," are being developed entirely to help trans and gender non-conforming people easily locate single-stall or gender-neutral bathrooms.<sup>26</sup> These innovations, however, are unable to fully mitigate the damages, both physical and mental, that trans people experience when denied bathrooms access.

### *C. Theories on Why Trans People are Denied Bathroom Access*

There are two overarching concerns often cited by those opposed to permitting trans people access to a bathroom that accords with their lived sex: fear of sexual violence and notions of privacy.<sup>27</sup> When excluding trans people from disability protections, the federal government statutorily placed trans people on a list of people with "divergent" sexual interests, including pedophiles, exhibitionists, and voyeurs.<sup>28</sup> In the United States there is a pervasive and institutionalized fear that trans people are sexual predators.<sup>29</sup> This fear is, however, entirely unfounded.<sup>30</sup> Moreover, the logic that bathrooms will be made safer simply by placing a "men only" or "women only" sign on the bathroom door is entirely unsound. Sexual predators, regardless of sex, will not likely refrain from entering a bathroom simply because a sign on the door says that they are not allowed to enter. Whether or not a sexual

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24. *Id.*

25. SAFE2PEE.ORG: BATHROOMS FOR EVERYONE, <http://safe2pee.org/new/> (last visited Feb. 7, 2013).

26. PEE IN PEACE, <http://peeinpeace.org> (last visited Feb. 7, 2013).

27. Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 369 (1999) (discussing how stereotypes about the trans community incite discrimination).

28. 29 U.S.C.A. § 705(20)(F)(i) (Westlaw through PL 112-207); Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12211(b)(1) (Westlaw through P.L. 112-207).

29. See Susan Etta Keller, *supra* note 27, at 369.

30. See, e.g., Delano Garvey, *Sexual Villainy: A Sex Offender Profile*, (Oct. 2009) <http://www.oocities.org/vandelist/research.htm> (user archive mirrored from Geocities) (noting that the typical sex predator is a single middle-aged Caucasian (presumably cis) male).

predator's entrance is legal will not affect the propensity to commit a further illegal act.<sup>31</sup>

The second overarching concern cited is privacy. The Eighth Circuit stated in *Sommers v. Budget Marketing*, that while the court was not unmindful of the problem the trans plaintiff was facing, the employer faced a "problem in protecting the privacy interests of its female employees."<sup>32</sup> However, author Susan Keller argues in *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, that no one should feel an overwhelming sense of privacy when using a public bathroom.<sup>33</sup> Keller explains that privacy in a public bathroom is oxymoronic because one is required to share public and workplace bathrooms with other people, making them inherently not private.<sup>34</sup> Furthermore, courts have made exceptions to this type of "privacy" challenge in the past. There are a number of prison cases addressing the privacy rights of female inmates housed with trans women in female-designated corrections facilities. For example, in *Crosby v. Reynolds*, the court rejected a privacy claim of a cisgender female detainee housed in a cell with a trans woman who had not had genital surgery, based on the premise that the trans woman's physical and psychological interests would be best served by being housed with other women.<sup>35</sup>

It should not go without mentioning that the latent concern in the battle for trans access to the correct bathroom is the maintenance of gender and sexuality norms. The defendants in *Etsitty v. Utah Transit Authority*<sup>36</sup> argued in their brief that permitting trans people access to the correct bathroom would be equivalent to "a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditch diggers to strip to the waist in hot weather."<sup>37</sup> On some level, transphobia and the discourse of normativity is driven by the urge to maintain the status quo—the gender and sex binary.

## II. THE LAY OF THE LAND

Employment discrimination law, namely Title VII, and federal disability law do not provide any meaningful recourse to trans people con-

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31. Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 925 n.170 (2007).

32. *Sommers v. Budget Mktg.*, 667 F.2d 748, 750 (8th Cir. 1982).

33. Keller, *supra* note 27, at 370.

34. *Id.*

35. *Crosby v. Reynolds*, 763 F. Supp. 666, 667, 670 (D. Me. 1991).

36. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007).

37. Brief of Appellees Utah Transit Authority and Betty Shirley at 16, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (No. 05-4193).

fronting bathroom access problems at work. However, state and city disability law hold promise.

### A. Title VII Claim as a Form of Protection?

Many attorneys and advocates for trans rights used to seek protection under Title VII, the federal law that prohibits employers from discriminating against their employees on the basis of sex. After all, it is literally “because of sex” that trans people are discriminated against, most often because their assigned sex at birth or genitals do not accord with their lived sex.<sup>38</sup> The discrimination is predicated on normative beliefs about how men and women should act and look, as well as the belief that people cannot, and should not, change their gender or sex.<sup>39</sup> However, Title VII sex discrimination arguments have fallen short of offering full protection for trans employees.

The relevant Title VII case law appears to provide a useful model for protecting against trans discrimination. However, Title VII falls short of protecting trans employees by failing to move beyond sex stereotyping as sex discrimination<sup>40</sup> into full protection for a person based on trans status alone. In *Price Waterhouse v. Hopkins*, the Supreme Court ruled that a person could bring a Title VII claim against an employer who discriminated against an employee for not conforming to gender stereotypes.<sup>41</sup> In *Price Waterhouse*, a female employee was discriminated against for acting in a “masculine” way by being aggressive and refusing to wear makeup. Several courts have recognized analogous Title VII “sex stereotyping” claims for trans persons. For example, in *Rosa v. Park West Bank & Trust Co.*, the First Circuit ruled, citing *Price Waterhouse*, that a woman, wearing female attire, could not be denied a loan application at a Massachusetts bank simply because she had been assigned male at birth and her attire did not accord with that assignment.<sup>42</sup> In *Schwenk v. Hartford*, the Ninth Circuit stated that under *Price Waterhouse*, Title VII protected against not only discrimination based on the biological differences between a man and a woman, but also the failure to conform to gender expectations.<sup>43</sup> However, the Seventh Cir-

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38. *Schroer v. Billington*, 424 F.Supp.2d 203, 212 (D.D.C. 2006).

39. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* xiii (1999) (discussing harassment as a means of “shoring up gender normativity”).

40. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

41. *Price Waterhouse*, 490 U.S. at 251.

42. *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).

43. *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000). See also *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (following *Smith v. City of Salem, Ohio*, 378 F.3d. 566 (6th Cir. 2004)).

cuit in *Ulane v. Eastern Airlines, Inc.* held that Title VII did not protect trans people from sex discrimination. Karen Ulane had been a pilot for Eastern Airlines for over ten years when she decided to undergo sex reassignment surgery.<sup>44</sup> Ulane was quickly discharged from her position with Eastern.<sup>45</sup> The Seventh Circuit held that the plain meaning of the prohibition of sex discrimination was to make unlawful discrimination “against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female.”<sup>46</sup>

While trans people may be able to successfully allege a sex discrimination claim under a sex stereotyping theory, since *Ulane* the courts have consistently found that they are not protected under the language of Title VII and therefore cannot make a claim under Title VII based on their trans status alone.<sup>47</sup>

### *B. Sexual Orientation Claims as a Form of Protection?*

To seek protection against discrimination under sexual-orientation anti-discrimination laws is to conflate trans status with homosexuality. Trans people are often discriminated against because people perceive them to be gay, based in part on their gender expression, without the aggressor actually knowing that the trans person is gay. The discrimination is therefore not because a person is gay but rather because they are perceived as such. A trans person might not identify as gay, lesbian, bisexual, or queer, but due to normative perceptions of gender presentation will appear to many people to be gay. Affirming rights under sexual orientation protections would not protect those trans people who do not appear gay or who are not gay. For example, in *Evans v. Hamburger Hamlet & Forncrook*, a plaintiff's claim under sexual orientation anti-discrimination protections failed when the Human Rights Commission in Illinois held that discrimination against a trans person was not covered because the discrimination did

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44. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1082–83 (7th Cir. 1984).

45. *Ulane*, 742 F.2d at 1082.

46. *Ulane*, 742 F.2d at 1085.

47. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (“[D]iscrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII.”); But cf. *Schroer v. Billington*, 424 F.Supp.2d 203, 212 (D.D.C. 2006) (“Without good reasons to oppose it, and with numerous courts now joining its conclusion—albeit under the *Price Waterhouse* framework—it may be time to revisit Judge Grady’s conclusion in *Ulane I* that discrimination against transsexuals because they are transsexuals is ‘literally’ discrimination ‘because of . . . sex.’”).

not have to do with that person's sexuality.<sup>48</sup> Moreover, the Commission found that, generally, the Seventh Circuit did not protect trans people under a sex discrimination framework.<sup>49</sup> Notably, the case withstood complete dismissal by virtue of its disability claim.<sup>50</sup>

### C. Gender Identity Claims as a Form of Protection?

Advocates and organizers are pushing for gender identity anti-discrimination legislation specifically designed to protect trans people.<sup>51</sup> Such protection, where enacted, would seem to provide a strong basis on which to challenge discrimination against trans people in workplace bathrooms. However, even such protections may be interpreted in ways that do not support trans people's access to appropriately gendered bathrooms.

Bathroom claims brought under gender identity anti-discrimination laws may fail because courts see bathroom access as a "sex" issue and not a "gender" issue. *Goins v. West Group, Inc.* is one of the most significant decisions in trans jurisprudence because it involves a state Supreme Court's first interpretation of a prohibition of discrimination against trans people.<sup>52</sup> In *Goins*, the plaintiff, a trans woman, was asked to use a unisex bathroom on a different floor after female coworkers expressed concerns about a "man" using the women's bathroom.<sup>53</sup> Goins refused to use the unisex bathroom and proceeded to use the women's bathroom.<sup>54</sup> After being threatened with disciplinary actions, Goins quit and brought suit against her employer.<sup>55</sup> The Minnesota Supreme Court found that the segregation of bathroom facilities by "biological gender"<sup>56</sup> was not discrimination on the basis of gender identity.<sup>57</sup> The decision of the employer to require employees to use the bath-

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48. *Evans v. Hamburger Hamlet & Forncrook*, No. 93-E-1771996, WL 941676 at \*3, (Chi. Comm'n on Human Relations 1996).

49. *Evans*, WL 941676 at \*4.

50. *Evans*, WL 941676 at \*7-9.

51. See, e.g., *Transgender Initiative*, FORUM FOR EQUAL., <http://forumforequality.org/wordpress/volunteer/projects/transgender-initiative/> (last visited Mar. 4, 2013) (detailing a specific action plan for promoting state and local legislation that includes gender identity anti-discrimination laws).

52. Jenifer M. Ross-Amato, *Transgender Employees & Restroom Designation- Goins v. West Group, Inc.*, 29 WM. MITCHELL L. REV. 569 (2002). The Minnesota law prohibited discrimination based on "sexual orientation," which was defined to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." *Goins v. West Group, Inc.*, 635 N.W.2d 717, 724 (Minn. 2001).

53. *Goins*, 635 N.W.2d at 721.

54. *Goins*, 635 N.W.2d at 721.

55. *Goins*, 635 N.W.2d at 721.

56. The court never defines these terms—perhaps the court is referring to sex?

57. *Goins*, 635 N.W.2d at 723.

room that accorded with their sex had nothing to do with their gender identity.

The court's narrow interpretation of state gender identity protection leaves Goins in an unhelpful *Catch-22*. If she argues there has been gender identity discrimination, she loses because the court says the distinction being made is about biological sex; yet if she takes her cue from the court and claims there has been sex discrimination, Goins is likely to be unprotected under Title VII for the reasons already discussed. As *Goins* makes clear, unless gender identity protections are carefully worded, courts may be able to interpret them in ways that continue to deny trans people the right to use bathrooms that accord with their lived sex.

#### *D. Using Disability Law to Protect Trans People from Discrimination*

State laws that prohibit discrimination on the basis of disability might offer a winning alternative argument for the legal protection of trans people. The first step in making the case for trans protections under disability law is determining whether or not a person's trans status qualifies that person as "disabled" such that the person can benefit from protection against disability discrimination. The stances of the federal government and the various fifty states on trans inclusion under disability law protections can be categorized into three general approaches: exclusion by statute or by case law, inclusion by statute or by case law, and no definitive stance to date.

##### **1. Federal Law and States That Expressly Exclude Trans People From Disability Law Protections Via Statute or Case Law**

Federal Law explicitly excludes trans people from protection against disability discrimination under disability law. There are two main sources within the federal law that protect disabled people. The first is the Federal Rehabilitation Act (FRA), which prohibits discrimination on the basis of disability in "programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors."<sup>58</sup> The second federal protection for disabled people is the Americans with Disabilities Act (ADA), which "prohibits discrimination on the basis of disability in employment, State and local government, public accommodations, commercial facilities, transportation, and

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58. U.S. DEP'T. OF JUSTICE CIVIL RIGHTS DIV. DISABILITY RIGHTS SECTION, *A Guide to Disability Rights Law* (2009), <http://www.ada.gov/cguide.htm#anchor65610>.

telecommunications.”<sup>59</sup> Both the FRA<sup>60</sup> and the ADA<sup>61</sup> expressly exclude trans people from disability law protection. Placed on a list with the likes of pedophiles and voyeurs, trans people are categorically denied federal protection pursuant to a disability discrimination claim.

The explicit exclusion was not in the original FRA but was added after Congress included the exclusion in the ADA. When Congress passed the ADA in 1990 it explicitly excluded trans people from the definition of disability. That same year, Congress amended the definition of disability in the FRA to reflect the ADA exclusion.<sup>62</sup> Some commentators on the amendments muse that they were added as reactions to federal judges including “transsexualism” as a disability under the federal law. For example, in 1986, the court in *Blackwell v. U.S. Dept. of Treasury* held that a trans plaintiff was sufficiently handicapped that he could state a claim under the FRA.<sup>63</sup> Shortly after the 1990 exclusions, the court in *Dobre v. Nat’l R.R. Passenger Corp. (Amtrak)* correctly pointed out that any reliance on *Blackwell* would overlook the recent amendment to the Act that “unambiguously exclude[d] transsexualism from the definition of the phrase ‘individual with a disabil-

59. *Id.*

60. The relevant statute reads:

The term “individual with a disability” does not include an individual on the basis of—

(i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) compulsive gambling, kleptomania, or pyromania; or

(iii) psychoactive substance use disorders resulting from current illegal use of drugs.

29 U.S.C.A. § 705 (Westlaw current through P.L. 112-207 approved 12-7-12).

61. The relevant statute reads:

The term “disability” shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

42 U.S.C.A. § 12211 (Westlaw current through P.L. 112-207 approved 12-7-12).

62. Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 83–84 (Paisley Currah, Richard M. Juang, & Shannon Price Minter, eds., 2006).

63. *Blackwell v. U.S. Dept. of Treasury*, 639 F.Supp 289, 290 (D.D.C. 1986). *See also Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 WL 9446 (D.D.C. 1985).



ity.”<sup>64</sup> Activists and scholars Jennifer Levi and Bennett Klein of the organization Gay & Lesbian Advocates & Defenders (GLAD) argue that Congress must have originally thought that trans people were disabled pursuant to the federal disability statutes because otherwise the legislature would not have expressly excluded trans people in the ADA.<sup>65</sup> Counter to their argument, the court in *Dobre* stated that the amendment “did not effectuate a substantive change in the law, but rather, merely ‘clarified the original intent of Congress as to the parameters of the definition of disabled individual.’”<sup>66</sup>

The implications of the legislative decision to explicitly exclude trans people from federal disability anti-discrimination laws has devastating effects on the fight for trans inclusion on the state level. State courts and state legislatures not only look to federal law, such as the ADA, for guidance but also will sometimes rely on it when interpreting their own state-specific disability law statutes.<sup>67</sup> Various states’ reliance on the federal statutes to exclude trans people from disability law protections has had the effect of creating persuasive precedent for other states who have not yet decided how to come down on their own state disability law statutes.<sup>68</sup> Moreover, the ADA and FRA almost always need to be contended with even if a state chooses to explicitly include trans people in its definition of disability. Courts in states that include trans people under disability law generally end up justifying their conclusions based on an explanation of why their particular state legislators chose not to follow the federal exclusions.<sup>69</sup> In addition to the federal disability statutes, ten states and Puerto Rico have explicit

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64. *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 289 (E.D. Pa. 1993) (referring to 29 U.S.C. § 705(20)(F)(i)(Westlaw current through P.L. 112-207 approved 12-7-12.)).

65. Levi & Klein, *supra* note 62, at 84.

66. *Dobre*, 850 F. Supp. at 289 (quoting *Winston v. Maine Technical College Sys.*, 631 A.2d 70, 74 (Maine 1993)).

67. *See, e.g., Dobre* 850 F. Supp. at 289 (using the express language of the FRA to exclude trans people from the definition of disability).

68. *See, e.g., Evans v. Illinois Dept. of Human Rights*, 1997 WL 377118 (Ill. Hum. Rts. Com.) (rejecting the ADA’s explicit transsexualism exclusion and looking to other states’ discrimination laws to conclude that transsexualism might be considered a disability under the Illinois Human Rights Act.).

69. *See Lie v. Sky Publ’n Corp.*, No. 013117J, 2002 WL 31492397, at \*6 (Mass. Super. Ct. Oct. 7, 2002) (comparing the Massachusetts state disability law with the ADA definition of disability and stating that: “The court finds more compelling the fact that this state’s legislature has never seen fit to make a similar amendment.”); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 376 (N.J. Super. Ct. App. Div. 2001) (distinguishing New Jersey human rights law from the ADA, which expressly excludes “transsexualism” and “gender identity disorders not resulting from physical impairments”).

statutory exclusions that prevent trans people from accessing the benefits of the state's anti-discrimination disability laws.<sup>70</sup>

Pennsylvania courts have interpreted the state's disability discrimination laws to exclude trans people from protection, despite the fact that the laws' definition of "handicapped or disabled person" does not include explicit exclusionary language.<sup>71</sup> A Pennsylvania court ruled in *Holt v. Nw. Pa. Training P'ship Consortium, Inc.* that "transsexualism" is not a protected disability under the Pennsylvania Human Rights Act despite the fact that it is not expressly excluded.<sup>72</sup> A few years prior, a federal court interpreting Pennsylvania law held in *Dobre* that the fact that "transsexualism" is a diagnosable condition does not lead to the conclusion that it is an "impairment" under Pennsylvania Law § 44.4, the Pennsylvania statutory provision that protects against discrimination on the basis of handicap or disability.<sup>73</sup>

North Carolina has had only one case that explicitly deals with the application of disability protections to trans people, *Arledge v. Peoples Services, Inc.*<sup>74</sup> The court in *Arledge* held that a trans plaintiff could not benefit

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70. These states include Idaho, IDAHO CODE ANN. § 15-1-201 (Westlaw through End of 1012 2nd Reg. Sess. of the 61st Leg.); Indiana, IND. CODE ANN. § 22-9-5-6(d)(3) (Westlaw through 2012 2nd Reg. Sess.); Iowa, IOWA CODE ANN. § 15.102(5)(b)(1)(b) (Westlaw through 2012 Reg. Sess.); Louisiana, LA. REV. STAT. ANN. § 51:2232(11)(b) (Westlaw through 2012 Reg. Sess.); Nebraska, Neb. Rev. Stat. § 48-1102(9) (Westlaw through 102nd Leg. 2nd Reg. Sess.); Ohio, OHIO REV. CODE ANN. § 4112.01(A)(16)(b)(ii) (Westlaw through all 2011 laws and statewide issues and 2012 files 70 through 159, 167, 170 to 175, 177, 182, 183, 185, 188 189, 191, 192, 195, 197 to 201 of the 129th GA (2011–2012)); Oklahoma, OKLA. STAT. ANN. tit. 25, § 1451(6) (Westlaw through Chapter 370 (End) of the 2nd Reg. Sess. of the 53rd Leg. (2012)); Oregon, OR. REV. STAT. ANN. § 659A.130 (Westlaw through End of the 2012 Reg. Sess. and ballot measures approved at the Nov. 6, 2012 General Election); Puerto Rico, 1 L.P.R.A. § 501 (Westlaw through Dec. 2010); Texas, TEX. PROP. CODE ANN. § 301.003(6) (Westlaw through the end of the 2011 Reg. Sess. and First Called Sess. of the 82nd Leg.); Virginia, VA. CODE ANN. § 36-96.1:1 (Westlaw through End of 2012 Reg. Sess. and End of 2012 Sp. S. I). See also 2011 Okla. Sess. Law Serv. Ch. 270 (S.B. 837) (West 2011); OR. REV. STAT. ANN. § 659A.118 (Westlaw through End of 2012 Reg. Sess. and ballot measures approved at the Nov. 6, 2012 General Election); and *Sommers v. Iowa Civil Rights Comm'n*, 377 N.W.2d 470, 474–76 (Ia. S.Ct. 1983) (holding that transsexualism is not a protected category under the Iowa civil rights statute which requires a person to be "substantially handicapped" such that he or she has a "physical or mental impairment which substantially limits one or more major life activities. . .").

71. 16 PA. CODE § 44.4 (Westlaw through Pa. Bulletin, Vol 43, Num. 2, dated Jan. 12, 2013).

72. *Holt v. Nw. Pa. Training P'ship Consortium, Inc.*, 694 A.2d 1134, 1138 (Pa. Commw. Ct. 1997).

73. *Dobre*, 850 F. Supp. at 289.

74. *Arledge v. Peoples Services, Inc.*, 02 CVS 1569, 2002 WL 1591690 (N.C. General Ct., Apr. 18, 2002).

from disability protection as a matter of public policy because trans people are not part of the class of people protected under the term “disability” in North Carolina.<sup>75</sup> The court in *Arledge* relied entirely on the federal exclusions, stating that North Carolina’s disability protections are modeled off of the federal disability laws.<sup>76</sup> This case remains inconclusive, as it is an unpublished Superior Court decision. It will be interesting to see what effect this might have in future North Carolina litigation regarding trans inclusion. The theory promulgated by the North Carolina court stands in direct contrast to, for example, the Massachusetts courts. Massachusetts courts relied on the federal government’s explicit exclusion of trans people under the definition of disability to conclude that the absence of this exclusion in Massachusetts’ disability laws demonstrated that the state legislature intended to include transgender individuals under the state disability law protections.<sup>77</sup> However, this line of reasoning has been called into question by the new gender identity protection act (An Act Relative to Gender Identity), which recently passed in Massachusetts.<sup>78</sup> Had the legislature intended to protect trans people under the disability anti-discrimination law, gender identity language in the new law would be unnecessary.

## 2. States that Expressly Include Trans People Under Disability Law Protections

In eight states, including Connecticut, Florida, Illinois, Massachusetts, New Hampshire, New Jersey, New York, and Washington State, as well as the city of Chicago and the District of Columbia, a person’s trans status does qualify that person for state or city protection against disability discrimination pursuant to the state’s anti-discrimination disability laws.<sup>79</sup>

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75. *Arledge*, 2002 WL 1591690.

76. *Arledge*, 2002 WL 1591690.

77. *See Doe v. Yunits*, No. 00-1060A, 2001 WL 664947 at \*4–5 (Mass. Super. Ct. Feb. 26, 2001); *see also Lie v. Sky Publishing Corp.*, No. 013117J, 2002 WL 31492397 at \*5–6 (Mass. Super. Ct. Oct. 7, 2002).

78. An Act Relative to Gender Identity, ch. 199, 2011 Mass. Acts, *available at* <http://malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter199>.

79. *Evans v. Hamburger Hamlet & Forncrook*, No. 93-E-177, 1996 WL 941676 at \*8, \*9 (Chi. Comm’n on Human Relations May 8, 1996) (holding that gender dysphoria is a disability under the Chicago Human Rights Ordinance); *Conway v. City of Hartford*, No. CV 95055303, 1997 WL 78585 at \*3, \*4 (Conn. Super. Ct. Feb. 4, 1997) (Connecticut state law covers transsexualism under disability and sexual orientation); *Comm’n on Human Rights & Opportunities v. City of Hartford (CHRO)*, CV094019485S, 2010 WL 4612700 (Conn. Super. Ct. Oct. 27, 2010) (Connecticut state law covers transsexualism under disability and therefore being discriminated against because of one’s trans status is a cognizable claim under the statute); *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882 at \*11, \*12 (Fla. Div. Admin. Hearings Oct. 2, 1991) (holding that an individual with

However, it is important to note that not all of the states that have interpreted their laws to include trans people or have passed legislation concerning trans identity as a disability permit bathroom access in accordance with a person's gender identity.<sup>80</sup> Almost all of the protections come from state judges interpreting the various state disability statutes to include trans people, many by virtue of the state legislature not explicitly excluding trans people from the definition of disability.

State disability protection thus will sometimes provide a useful avenue to preventing discrimination against trans people. However, if advocates succeed in passing carefully-worded state gender identity anti-discrimination legislation,<sup>81</sup> interpreting trans identity as a disability under current disability law protections will become less useful. It is unlikely a state court will interpret disability law as covering gender identity where there is explicit language elsewhere. Moreover, it becomes less likely that trans plain-

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gender dysphoria is "disabled" and therefore covered by the Florida Human Rights Act) (substantially limited by *Fishbaugh v. Brevard Cnty. Sheriff's Dep't*, Order No. 04-103 (Fla. Comm'n on Human Relations 2004)); *Lie v. Sky Publishing Corp.*, No. 013117J, 2002 WL 31492397 at \*6 (Mass. Super. Oct. 7, 2002) (holding GID to be a physical or mental impairment that, in its unmitigated form, substantially impairs one or more major life activities, and therefore transsexual people are covered under Massachusetts state disability laws); *Jette v. Honey Farms Mini Mkt.*, 23 M.D.L.R. 229 (Mass. Comm'n Discrim. Oct. 10, 2001) (holding that state law prohibiting disability discrimination protects transsexual people under Massachusetts law); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 at \*6 (Super. Ct. Oct. 11, 2000) (holding that a transsexual person had stated a viable disability claim under Massachusetts law); *Doe v. Electro-Craft Corp.*, No. 87-B-132, 1988 WL 1091932 at \*4 (N.H. Sup. Ct. April 8, 1988) (holding that transsexualism is a disability within the meaning of the New Hampshire employment discrimination statute); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001) (holding that gender dysphoria is a disability under the New Jersey Law Against Discrimination); *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (holding that a transsexual youth was protected by New York state law prohibiting discrimination on the basis of disability); *Doe v. Boeing Co.*, 846 P.2d 531, 536 (Wash. 1993) (holding that gender dysphoria is a disability under Washington law); *Blackwell v. U.S. Dep't of Treasury*, 830 F.2d 1183 (D.C.Cir.1987) (recognizing an employment discrimination claim based on a person's trans status as a handicap covered by the Federal Rehabilitation Act prior to the addition of the explicit exclusion); *Doe v. United States Postal Service*, 37 F.E.P. Cases 1867, 1985 WL 9446 (D.C.Cir.1985) (recognizing an employment discrimination claim on the basis of a person's trans status under the FRA prior to the addition of the explicit exclusion).

80. See Non-Discrimination Laws that Include Gender Identity and Expression, TRANS-GENDER LAW & POLICY INST. (Feb. 1, 2012), <http://www.transgenderlaw.org/ndlaws/index.htm#restrooms>. The following states and cities have explicitly incorporated language in their anti-discrimination statutes and policies regarding restroom access: Colorado, Iowa, San Francisco, Washington State and the District of Columbia. *Id.*

81. See *supra* Part II-C.

tiffs would use disability law to challenge discrimination, as it is more likely that they would utilize the express language of gender identity laws. For now, though, state disability protections are an important resource for those seeking to protect trans people from discrimination. I will expand on the usefulness of disability law as an avenue for social and institutional change in Parts III and IV.

### 3. States that Have Not Yet Taken a Stance on the Matter

In thirty-one states, a person's trans status might or might not qualify that person for protection by the state against discrimination pursuant to the state's anti-discrimination disability laws.<sup>82</sup> In these thirty-one states the courts and the legislatures have not yet had to answer the question of whether trans status qualifies as a disability. The outcome is likely to vary depending on a number of factors: the definition of disability in the relevant statute; the other states or law review articles that the given state looks to as persuasive precedent or evidence; the deference to federal statutes; and state court conclusions based on the absence of an express exclusion of trans people in the state statute.<sup>83</sup> It is in the states where the issue remains unresolved that framing the disability law case for trans protections has the most power and influence by virtue of its uncharted territory.

## III. THE DISABILITY LAW CASE

We now return to the hypothetical presented at the beginning of this Note. Assuming that there are no explicit exclusions or inclusions in the state where Ben lives, there are three claims under disability law that are likely to be effective tools for arguing that Ben, and trans men similarly situated, should have access to the male bathroom at work: disparate treatment, disparate impact, and reasonable accommodation.<sup>84</sup>

The three theories of disparate treatment, disparate impact, and reasonable accommodation are usually the legal claims available to people with disabilities in suits against their employers. In general, courts find disparate treatment when an employer singles out an otherwise capable employee from a protected class and treats them differently from other employees.<sup>85</sup> In this case, the company that Ben works for has created a policy that isolates Ben, as a trans employee, and treats him less favorably as compared to

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82. See *supra* Part II-D-1-2.

83. Inclusion of the definition of disability and the relevant case law for each of the 31 states is beyond the scope of this Note. The relevant material proves inconclusive regarding inclusion or exclusion of trans people under disability law protections.

84. The same theory would apply to trans women.

85. See, e.g., N.Y. City Admin. Code § 8-107.

other company employees. Ben, by virtue of being trans, should be considered a member of the protected class of people with disabilities.<sup>86</sup> The court finds disparate impact when an employer's otherwise facially neutral policy has an adverse effect on members of a protected class.<sup>87</sup> In this case, the company's requirement that all employees use the bathroom that accords with his or her "biological sex" has a detrimental effect on trans people, whose bodies or anatomy may differ from what is typically associated with their lived sex. Finally, a court finds a violation of reasonable accommodation policies when an employer fails to adjust a policy that negatively impacts a disabled employee such that it prevents that person from enjoying equal rights.<sup>88</sup> This adjustment must be reasonable. In this case, the company's bathroom policy prevents Ben from his right to use the men's bathroom. Thus, the reasonable accommodation would be to permit Ben to use the men's bathroom.

#### *A. Trans Status as a Disability*

For Ben to argue under any of the theories presented he would have to establish that he has a disability and that disability has given rise to the behavior for which he is being discriminated against. Most state disability laws define a person with a disability as (1) having a physical or mental impairment that substantially limits a major life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.<sup>89</sup>

Ben would likely need to argue that he has a disability because he has been diagnosed with Gender Identity Disorder (GID).<sup>90</sup> GID is a mental and physical disorder. It is typically characterized by a "strong and persistent desire to be a member of another sex coupled with a continued discomfort with one's biological sex."<sup>91</sup> According to the World Professional Associa-

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86. *Infra* Part III-A.

87. *Id.*

88. *Id.*

89. This definition is a synthesis of most definitions of disability that appear in various state statutes. *See e.g.*, N.C. GEN. STAT. ANN. § 168A-3 (Westlaw through S.L. 2013-1 of the 2013 Regular Session of the General Assembly); IND. CODE ANN. § 12-12-8-3.4 (Westlaw through 2012 Second Regular Session); ILL. COMP. STAT. ANN. ch. 20 § 2405/12a (Westlaw through P.A. 97-1166 of the 2012 Reg. Sess., and through P.A. 98-2 of the 2013 Reg. Sess.).

90. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 2, at 576.

91. *Id.* I want to be careful here not to conflate trans status with GID. There are several reasons to avoid this: not all people who are trans or who have medically transitioned have been diagnosed with GID; WPATH has moved away from the language of GID as the treatment for gender dysphoria; moreover, if GID were to be removed from the DSM, the entire argument would be rendered moot.

tion for Transgender Health (WPATH), the diagnosis of Transsexualism was introduced in the DSM-III in 1980.<sup>92</sup> In 1994, the DSM-IV committee opted to replace the listing of “Transsexualism” with “Gender Identity Disorder.”<sup>93</sup> Note, however, that Gender Dysphoria is to replace GID in the fifth edition of the Diagnostic and Statistical Manual (DSM-V), which is scheduled for release in May 2013.<sup>94</sup> It is unclear how the DSM change to Gender Dysphoria will affect the argument that trans people should be protected by disability law. However, it may not change the analysis significantly, since a diagnosis of Gender Dysphoria will likely take the place of GID. Acquiring a diagnosis of either GID or Gender Dysphoria presents problems for those trans people who do not have access to health care facilities or are unable to afford medical assistance. The need to obtain a medical diagnosis in order to be considered disabled thus poses particular difficulties for low-income trans people.

A diagnosis of GID has proven useful in other areas of the law to argue that trans health expenses are medical and not cosmetic. The United States Tax Court recently issued a decision in *O'Donnabhain v. Commissioner of Internal Revenue* affirming for the first time that treatment of GID qualifies as medical care under the Internal Revenue Code, thereby making the expenses associated with transition-related care deductible, i.e., sex reassignment surgery and hormone therapy.<sup>95</sup> The Tax Court decision means that because GID is a medical condition, all such treatments are medical in nature and not cosmetic.<sup>96</sup> The decision also indicates, however, that a diagnosis of GID is likely a prerequisite to these deductions, once again raising issues of class and access. The IRS argued unsuccessfully that the trans plaintiff was not suffering from a disease because trans identity is a “social construct.”<sup>97</sup> The Tax Court rested its decision in part on the fact that GID was a “disease” because it is listed in the DSM-IV.<sup>98</sup>

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92. STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE (The World Prof'l Ass'n for Transgender Health, 7th ed. 2011), available at [http://www.wpath.org/publications\\_standards.cfm](http://www.wpath.org/publications_standards.cfm).

93. *Id.* The 7th Edition of WPATH does not address GID or transsexualism.

94. American Psychiatric Association, *DSM-5: The Future of Psychiatric Diagnosis*, DSM-5 DEVELOPMENT, <http://www.dsm5.org/Pages/Default.aspx> (last visited, Mar. 4, 2013) (giving the release date); Dani Heffernan, *The APA Removes “Gender Identity Disorder” from Updated Mental Health Guide*, GLAAD, (Dec. 3, 2012, 11:38 AM), <http://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide> (discussing the change).

95. *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 59 (2010).

96. *O'Donnabhain*, 134 T.C. at 59.

97. *O'Donnabhain*, 134 T.C. at 59.

98. *O'Donnabhain*, 134 T.C. at 60.

In addition, trans status is arguably a disability because being trans substantially limits major life activities. Some trans people are required to regularly self-administer medically related treatments including hormones, or seek out medical professionals on a regular basis for treatments like long-term electrolysis sessions. If disability in a state statute is defined by the need for continued and long-term medical care and services, many trans people would qualify.

### *B. Disparate Treatment Claim*

Having established that there is a strong argument that trans people should be protected by disability law, Ben could bring a claim under a disparate treatment theory. The company's insistence that Ben use the handicap-accessible bathroom or the bathroom that does not accord with his sex as male (i.e., the women's bathroom) is arguably predicated on the fact that Ben is a trans man. Thus his disability has given rise to the behavior for which he is being discriminated against. But what exactly does it mean to not be "man" enough to use the male bathroom? New York State courts have rejected the idea that sex is based on genitalia alone. In *Maffei v. Kolaeton Industry, Inc.*, the court noted that:

At birth, sex is identified by external genitalia. However, experts now generally agree that there are at least seven variables that interact to determine the ultimate sex of an individual, to wit: 1) Chromosomes (XX female, XY male; 2) Gonads (ovaries or testes); 3) Hormonal secretions (androgens for males or estrogens for females); 4) Internal reproductive organs (uterus or prostate); 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self-identity.<sup>99</sup>

It is likely the case that an employer's refusal to permit a trans man to use the male bathroom is based on genitals alone and that a variety of other transition-related surgeries would likely not satisfy the company's policy (i.e., top surgery, hysterectomy etc.).

The focus on Ben's genitals, as opposed to any of the other sex characteristics noted in the New York State decision, also speaks to other concerns that the company may have in permitting Ben to use the male bathroom. As noted in Part I, Section C, the two major concerns are sexual violence and privacy. In a workplace setting it is unlikely that sexual violence would be the predominant concern, considering most employees are familiar with one another and would be able to quickly identify any perpetrators. The more

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99. *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391, 394 (Sup. Ct. 1995).



likely concern is that the other male employees would feel that their privacy interests are implicated by permitting a trans man to use the bathroom with them; in other words, the other male employees may be uncomfortable with Ben. But, is the concern that Ben has atypical genitalia, or is it that the other male employees think Ben is in fact a woman, thereby implying that trans identities do not exist?

The argument that Ben has atypical genitalia is relatively baseless considering that a concern of this nature would necessarily implicate men, labeled male at birth, who for one reason or another have suffered damage to their genitals. For example, it is unlikely that a male employee would vocalize feeling uncomfortable with a war veteran who suffered damage to his genitals or a fellow employee who suffered genital damage in a motorcycle accident. The more difficult concern would be if the male employee does not believe that trans identities exist and that Ben is actually a woman. Here, an employee would have to contend with the fact that GID is a recognized disability in the medical profession and that simply willing this fact away will not suffice.

The company could also argue that refusing to permit Ben to use the men's bathroom is not unlawful disability discrimination because everyone is required to use the bathroom that accords with his/her biological sex, i.e., genitals. The crux of the company's argument would be that the bathroom policy does not single out trans people because it applies equally to all employees. For example, in *Doe v. Bell* the New York state court held that a dress-code policy that prohibited the residents of a male group foster home from wearing "female attire," even though created in response to the trans plaintiff, was not discriminatory under the state human rights law disability protections because it applied equally to all residents.<sup>100</sup> This argument would be difficult to contend with and it is likely the case that if an employer was able to define "man" by genitals alone and then implement a policy based on biology alone, such a policy would be valid.

In addition, an employer could argue that being cis is a bona fide occupational qualification (BFOQ). A BFOQ is "an employment qualification that, although it may discriminate against a protected class (such as sex, religion, or national origin), relates to an essential job duty and is considered reasonably necessary to the operation of the particular business."<sup>101</sup> BFOQs are a defense to disparate treatment under Title VII. The Supreme Court in *Price Waterhouse* stated that in "passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation

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100. *Doe v. Bell*, 194 Misc. 2d 774, 780 (N.Y. Sup. Ct. 2003).

101. BLACK'S LAW DICTIONARY 199 (9th ed. 2009).

of employees.”<sup>102</sup> Rendering these factors irrelevant is a step in the elimination of “stubborn but irrational prejudice.”<sup>103</sup> It may well be, after *Ulane*, that Congress intended BFOQ defenses to only exclude such things as race and not necessarily gender or trans status.<sup>104</sup> Regardless, the BFOQ defense is likely to fail on facts alone, as there are very few jobs that require an employee to have a certain set of genitals to perform the task. For the jobs where specific genitals are not required to perform the task but a person’s gendered presentation does matter, the BFOQ defense is particularly interesting. The argument would be, for example, that a specific job requires only men and that a woman would not be able to do the job. However, this necessarily raises the question of who qualifies as a man. Is Ben not a man? And if not, who gets to decide? The employer? The courts? Ben? An analysis of this issue is beyond the scope of this Note but it remains an interesting question for future research and advocacy work.

### C. Disparate Impact Claim

Generally, disparate impact claims require a facially neutral policy that results in harm to a protected group. In Ben’s case, the company’s policy is that bathroom usage is determined by “biological sex,” which the company seems to define as genitals alone. The policy is facially neutral, but has a disparate impact on trans employees because trans people’s lived sex differs from their sex assigned at birth. The company’s policy forces trans people either to use a bathroom that does not match their lived sex, or to use a unisex bathroom. Under the company’s policy, all cis employees are permitted to use the bathroom in accordance with their lived sex, thus only negatively impacting trans people. For trans employees, the effect of being forced to use a bathroom that is isolated and different from that used by other members of their lived sex can be stigmatizing, degrading, and potentially embarrassing.

The company may argue that the bathroom policy is necessary to prevent employee discomfort and that avoiding employee discomfort promotes the successful performance of the company. For example, other male employees might quit or be less productive if Ben were to use the male bathroom. The question here would be twofold: (1) is the concern for employee productivity strong enough to permit an employer to deny bathroom access

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102. Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 10 (2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (Brennan, J., plurality opinion)).

103. See *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1563 (9th Cir. 1994).

104. Post cites a lack of a BFOQ for race as proof of this fact. Post, *supra* note 102, at 7–8.

to trans employees, and (2) should the law sanction policies that encourage transphobia? If the law states that an employer may not cater to the racism or sexism of their employees, it should not allow the accommodation of other prejudices.

#### *D. Reasonable Accommodation Claim*

Once Ben has established that he has a legally cognizable disability, he is then entitled to request accommodation for this disability from his employer. The employer need only provide accommodation if it is reasonable to do so. In *Doe v. Bell*, the court found that, despite a male group foster home's neutral policy that "female attire" was prohibited, the facility was still required to make an exception to the policy as a reasonable accommodation for trans residents.<sup>105</sup> Here, the reasonable accommodation would be to permit Ben to use the men's bathroom. Generally, the requirement to provide reasonable accommodation to people with disabilities is to enable a person with a disability to satisfy the essential requisites of a job. Use of the bathroom during work hours is essential to a person's performance and fulfillment of the requirements of any job.

Here, the company would be able to argue that Ben is permitted to use the handicap bathroom and the women's bathroom. It is not as though he is without a bathroom entirely. However, the impact of not being able to use the male bathroom like other men causes anxiety and stress, thus serving as an obstacle to performing the requirements of his job. The company could also argue that permitting Ben to use the men's bathroom would cause them an undue hardship. Here, however, there would be no cost to the company to accommodate Ben. The men's bathroom would not need to be altered in any way for Ben to use it.

There are non-financial factors that must also be balanced when assessing undue hardship. According to some federal and state case law, the fear of lawsuits has been held by the courts to be sufficient to prevent a trans person from using the bathroom in accordance with lived sex. For example, in *Etsitty*,<sup>106</sup> the Tenth Circuit found that fear of litigation from customers uncomfortable with using the same bathroom as a trans employee was a legitimate and lawful excuse for denying access to the trans employee from using the bathroom in accordance with her lived sex.<sup>107</sup> *Etsitty* can be distinguished on the grounds that the plaintiff was utilizing a number of public bathrooms along her route as a public bus driver.<sup>108</sup> Here, Ben's usage re-

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105. *Doe*, 194 Misc. 2d at 787.

106. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1215 (10th Cir. 2007).

107. *Etsitty*, 502 F.3d at 1224.

108. *Etsitty*, 502 F.3d at 1224.

quest is limited to the men's bathroom at his place of employment and as such would not expose the company to general liability. Conversely, a Georgia District Court in *Glenn v. Brumby* noted that the fear of lawsuits over one bathroom could potentially be a legitimate reason to terminate a trans employee.<sup>109</sup> The court in *Glenn* found that the defendant's fear of litigation was unsubstantiated. However, the court did reach the conclusion that even with only one bathroom in question, fear of litigation is a valid undue hardship defense to equal bathroom access for trans people.<sup>110</sup>

In addition to a fear of lawsuits, the company might also argue that they are concerned for the safety of Ben and the other male employees at the company. For example, in *Kastl v. Maricopa County Community College District*, a trans professor was denied access to the women's bathroom until after she had completed sex reassignment surgery.<sup>111</sup> The community college where the plaintiff was teaching claimed that for safety reasons it did not feel comfortable having the trans professor use the women's bathroom. The court determined that concerns for safety were legitimate, legal, and nondiscriminatory excuses.<sup>112</sup> Safety concerns for Ben as he uses the men's bathroom could be undercut by the fact that Ben may actually feel less safe using the women's bathroom. Moreover, safety concerns for the other employees could be dealt with by offering those employees who are uncomfortable the opportunity to use the single stall bathroom available in the office building. In the end, this is a tough defense to combat and presents an obstacle to the reasonable accommodation claim.

The company's policy, that one's genitals alone determine bathroom usage, singles out trans people and treats them differently from other employees at the company. As discussed previously, such company policies are discriminatory either under the theory of disparate treatment or disparate impact. Ben is also entitled to reasonable accommodation so that he can enjoy the right of using the bathroom at work without feeling humiliated and stigmatized. The questions for the courts will rest on whether it thinks Ben is in fact a "man" and whether fear of other male employees is enough to justify denying Ben access to the male bathroom.

#### IV. IS USING THE DISABILITY LAW FRAMEWORK A GOOD IDEA?

Disability discrimination laws can and do offer new ways to successfully protect and affirm trans rights. However, is it worth the potential stigma associated with labeling trans people as "disabled"? Does such label-

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109. *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1303 (N.D. Ga. 2010).

110. *Glenn*, 724 F. Supp. 2d at 1303.

111. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492 (9th Cir. 2009).

112. *Kastl*, 325 F. App'x at 493-94.

ing necessitate the medicalization of a person's identity in order to benefit from the protections? If medicalization is a requirement, what are the implications for people who, for financial reasons, are unable to access medical professionals?

Even the most prominent of trans activists and attorneys note that using disability law, while "significant" in so much as it is capable of enormous success, comes with potential stigma vis-à-vis disability.<sup>113</sup> There is a gut reaction to the notion of using disability law to advance trans rights. The automatic reaction is to associate disability with flaw and to therefore assume that by using disability law, one is actually advancing an argument that trans people are flawed. However, this notion totally misunderstands disability law. To automatically associate disability with flaw is, at its core, ableist. As Dean Spade argues in *Resisting Medicine, Re/Modeling Gender*, the disability rights movement is "about pointing out that disabled people are capable of equal participation, but are currently barred from participating equally by artificial conditions that privilege one type of body or mind and exclude others."<sup>114</sup> Author Jennifer Levi argues that the purpose of disability law is to protect people who are "able to work but are prevented from doing so because of the prejudice of others."<sup>115</sup> In both Spade and Levi's understandings of disability law, the language assumes that a person is fully capable of performing the essential elements of any job and should be protected through accommodations related to their disability rather than prevented from performing to the best of their potential. This framework is directly applicable to trans people. It is premised on the theory that if the social and physical environment were structured differently, there would be no such thing as a disability.<sup>116</sup>

Trans people are forced to contend with notions of gender and sex normativity and but for the artificial barriers imposed by society, such as sex-segregated bathrooms, trans people would have no bar to their full participation.<sup>117</sup> Spade argues that at the core, "trans people are fighting against entrenched notions about what 'normal' and 'healthy' minds and bodies are, and fighting to become equal participants with equal access and equal protection from bias and discrimination."<sup>118</sup> The disability framework offers

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113. Levi & Klein, *supra* note 62, at 83.

114. Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 34-35 (2003).

115. Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 105 (2006).

116. See Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1355-56 (1993).

117. Spade, *supra* note 114, at 34.

118. *Id.*

a way to conceive of these difficulties and use them to effectuate change. Moreover, there is a political benefit to aligning trans discrimination with disability discrimination. Such an alignment would allow trans people and people with disabilities to understand one another as part of the same movement against ideas of normative bodies—thus increasing the potential for coalition building and community organizing around issues of “body” discrimination.

Some trans advocates argue that one of the harms in using disability law as an anti-discrimination strategy is the affirmation of GID as a legitimate diagnosis.<sup>119</sup> Activist Pauline Park has argued that GID should generally be abolished as it pathologizes trans people: “I like to say I don’t have a gender identity disorder. Society has a gender disorder.”<sup>120</sup> Moreover, use of the disability framework may necessarily stand on a diagnosis of GID and therefore reinforce normalized, cis-centric notions of gender and sex. For many trans people, obtaining a GID diagnosis requires producing a narrative of childhood gender dysphoria and sometimes a narrative of compulsory heterosexuality. A GID diagnosis also imposes a binary notion of gender.

Using disability law to protect the rights of trans people could thus discourage the elimination of the sometimes harmful diagnostic tools and practices that serve as the foundation of this litigation. Effective use of the disability law framework could encourage and perpetuate the medicalization of trans people.<sup>121</sup> It comes down to perpetuating a framework that, by its description, necessarily forces trans protections to be dependent on medical diagnosis. This line of reasoning necessarily raises the question of whether it is still worth it to use disability protections.

Some of the concerns critics have raised about disability law reinforcing the power of the GID diagnosis may become less persuasive given the DSM-V move from Gender Identity Disorder to Gender Dysphoria.<sup>122</sup> Moreover, the disability law framework also has the ability to humanize trans people in the eye of the court.<sup>123</sup> The disability framework gives a court “a construct for understanding why someone cannot conform to a

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119. See Levi & Klein, *supra* note 62, at 89.

120. *In Her Own Image: Transgender Activist Pauline Park*, THEGULLY.COM (July 2, 2002), [http://www.thegully.com/essays/gaymundo/020702\\_transgender\\_p\\_park.html](http://www.thegully.com/essays/gaymundo/020702_transgender_p_park.html) (last visited Nov. 18, 2011). See also Jason Cromwell, *Transmen & FTMS: Identities, Bodies, Gender & Sexualities* 22, 125 (1999) (“Identities framed within a medical border effectively negated individual identity and erased those whose histories, identities, bodies, and sexualities did not fit within the critical boundaries of ‘true transsexuals.’”).

121. See Spade, *supra* note 114, at 33.

122. See *supra* note 94 and text accompanying (on the upcoming change to the DSM).

123. Levi, *supra* note 115, at 104.

gender stereotype and does so in language a judge can understand.”<sup>124</sup> At some point in the fight for civil liberties, the question of placating the decision-makers arises. Should you or should you not speak in a language that makes sense to the judges that will inevitably be deciding these cases?

There are also class-based critiques regarding the accessibility of disability law protections. Disability law privileges those individuals who can afford to pay for a diagnosis of GID or Gender Dysphoria. By its very nature, disability law excludes people who either have no access to or cannot afford the necessary medical diagnosis, medications, hormones, and/or surgeries.<sup>125</sup> Unfortunately, this financial barrier is a major problem for many trans people. According to the 2011 survey by the National Center for Transgender Equality and the National Gay and Lesbian Task Force, trans respondents were “nearly four times more likely to have a household income of less than \$10,000 per year compared to the general population.”<sup>126</sup> The San Francisco Department of Public Health conducted a study in 1999 finding median monthly incomes of \$744 for trans women and \$1,100 for trans men.<sup>127</sup> This obstacle to many in the trans community demonstrates a need for a holistic approach—legal activism simply is not enough to tackle the larger issues of trans discrimination that impact the intersections of trans identity.

In the author’s opinion, disability law’s effectiveness as a litigation tool outweighs its drawbacks to the trans movement because it furthers the goal of equal access.<sup>128</sup> It is an expressive statement to the general public and specifically to other employees that trans people can be integrated into society and should be equal participants. The interest of the trans plaintiff should be the center of any claim, as it is their rights that are being made subject to the unfounded fears of the general public. If a successful line of disability-bathroom cases is brought, trans people will no longer need to stand in front of the bathrooms wondering, like the poet Ray Durem, how to use them in this free world. Like the fight for racial equality and the fight

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124. *Id.*

125. Spade, *supra* note 114, at 35–36. See also Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL’Y 7, 15 (2007).

126. NAT’L CTR. FOR TRANSGENDER EQUAL. AND NAT’L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), available at [http://www.thetaskforce.org/reports\\_and\\_research/ntds](http://www.thetaskforce.org/reports_and_research/ntds).

127. The Transgender Community Health Project, SAN FRANCISCO DEP’T OF PUB. HEALTH (1999), available at <http://hivinsite.ucsf.edu/InSite?pagecftg-02-02>.

128. The author recognizes that as a cis woman her point of view is necessarily limited, and that trans people themselves should have the final say on how best to protect their rights.

for sex equality, the trans fight for equality should use the tools at its disposal to further the equal rights agenda. Ableist notions of what it means to be disabled and fear of the perpetuation of trans medicalization should not stand in the way of a winning argument. As an attorney there is an ethical obligation to clients to plead winning claims and this option should not be so readily dismissed. While it is true that there are valid and personal reasons that make disability an imperfect framework, it has been effective and may continue to provide success in the future. Litigators and trans activists should at least consider the benefits of the disability argument.<sup>129</sup>

*A. Note on the Gender-Neutral Bathroom Alternative*

The option of gender-neutral facilities in lieu of direct access to the bathroom that accords with a trans person's lived sex is not a viable alternative for those trans people that self-identify according to the gender binary. Gender-neutral facilities in all public accommodations, workplaces, and schools would provide privacy for trans people who are transitioning or who do not feel comfortable entering a public bathroom. However, they would not be a substitute for access to gendered bathrooms for those that want or need that access. Gender-neutral bathrooms might, however, be a way of addressing the privacy concerns of those who object to trans people using the appropriate bathrooms for their gender identity. Any person concerned with sharing a bathroom with a trans person would be able to use a separate bathroom.<sup>130</sup>

"The proper means of attaining transgender equality is not to segregate the group into an extraneous 'other' category," but rather to treat trans people as the majority is treated and to therefore permit each person bathroom access based on that person's lived sex.<sup>131</sup> Gender-neutral bathrooms would do little to satisfy the larger, systemic issue of preventing trans people from fully identifying as and accessing facilities that reaffirm their membership in a gender and sex that accord with their lived identities. Creating a bathroom that is separate and distinct from the larger population re-inscribes notions of "otherness" and serves as its own form of discrimination. A gender-neutral bathroom offers a stark example of what outsider status is like: if society is composed only of those who enter the women's room and

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129. I am not suggesting that attorneys move forward with the disability framework uncritically. As Spade states, with regards to the use of disability law, "I use these claims with extreme caution." Spade, *supra* note 114, at 35.

130. The Department of Justice made a similar argument regarding the Don't Ask, Don't Tell repeal. If homophobic soldiers have a problem with gay soldiers, then they can be placed in separate housing.

131. Elkind, *supra* note 31, at 927.



those who enter the men's room, requiring someone to use a third bathroom tells them they are outside society.<sup>132</sup> The goal is not access to just *any* bathroom, but rather to equal rights.

### CONCLUSION

The use of disability law towards anti-discrimination protection ends, while certainly not without controversy, is effective in many instances and should continue to be used by activists and litigators in the fight for trans rights. Disability law has succeeded in instances where sex, gender, and sexual orientation protections have failed. In the author's opinion, the stigma around using disability law and the fears of medicalization of trans bodies and identities should not stand in the way of what has proven to be a successful argument. As O'Donnabhain, the plaintiff in the aforementioned tax case, noted in an interview on NPR in 2011, "I haven't liked this diagnosis [referring to GID] from the very beginning. But I've got to play the game."<sup>133</sup> Returning to Ben's question, the answer should be a resounding *yes*; prohibiting a trans man from using the men's bathroom at his place of employment *does* constitute disability discrimination in those states that have not explicitly excluded trans people. There is no question that there is work to be done in order to live in a world where trans discrimination is taken seriously and trans anti-discrimination protections abound. Until that time, trans advocates should not only play the game, but should play to win. ♣

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132. Abigail W. Lloyd, Comment, *Defining the Human: Are Transgender People Strangers to the Law*, 20 BERKLEY J. GENDER L. & JUST. 150, 193 (2005) (citing Currah & Minter, *supra* note 8, at 38–39).

133. Tovia Smith, *Transgender Woman, IRS Fight Over Tax Deduction*, NATIONAL PUBLIC RADIO (Oct. 16, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=15327911>.